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No. 89

IN THE

Supreme Court of the United States

October Term, 1952

AUTOMATIC CANTEEN COMPANY OF AMERICA, Petitioner

v.

FEDERAL TRADE COMMISSION, Respondent

National Candy Wholesalers Association, Inc.,
Movant

MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE

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To the Honorable, The Chief Justice of the United States
and the Associate Justices of the Supreme Court of the
United States:

Now comes the National Candy Wholesalers Association, Inc., and respectfully moves this Court, pursuant to Rule 27, paragraph 9, of the Rules of this Court, for leave to file a brief amicus curiae in this case. The consent of the attorney for the respondent herein to the

filing of a brief has been obtained and filed with the Clerk of the Court. The consent of the attorneys for the petitioner was requested but was refused. The interest of the National Candy Wholesalers Association, Inc., and its reasons for asking leave to file a brief *amicus curiae* are set forth below.

Movant, a corporation organized under the laws of Maryland, is a national non-profit trade association. As provided in movant's by-laws, its purpose is "to promote the best interests of the wholesale distributors of candy and to unite the members of the wholesale confectionery industry in all lawful measures for its common good," and its active members are "individuals, firms or corporations selling at wholesale confectionery products other than those of their own manufacture," of which there are now approximately 1,000 in number, doing business in 47 states.

Candy wholesalers, including members of movant, are in substantial competition in many areas with petitioner in this proceeding and have been discriminated against by the more favorable prices and terms which the petitioner was found to have knowingly induced and received. (Transcript of Record, in the Court of Appeals for the Seventh Circuit, pp. 250-253, 266-267, 288-289).

The movant, over the protest of the petitioner before this Court, was permitted to intervene in the proceedings before the Federal Trade Commission to the extent of filing written briefs on the merits and presenting oral argument before the Commission (ETC Docket No. 4933, Order Granting In Part the Application of National Candy Wholesalers, Inc., September 19, 1947). The brief of the National Candy Wholesalers Association, Inc., as intervenor on the Motion to Dismiss of Automatic Canteen Company of America (petitioner here), was filed before

the Commission on October 31, 1947, and counsel presented oral argument November 6, 1947.

Again, in the review of the Order of the Federal Trade Commission before the United States Court of Appeals for the Seventh Circuit, by that Court's order dated July 31, 1951, movant was granted leave to file a brief as *amicus curiae*; and subsequently by order dated December 5, 1951, counsel for movant was granted leave to present oral argument. Movant's brief was filed on December 3, 1951, and oral argument was presented by counsel on December 6, 1951.

The Acting Solicitor General of the United States has consented to movant's filing a brief *amicus curiae* before this Honorable Court, in view of its participation in the case before the Commission and the Court of Appeals. Counsel for petitioner have denied consent.

The interest of the movant is in that part of the Order of the Federal Trade Commission which directs petitioner herein to cease and desist from knowingly inducing or receiving discriminations in price in violation of section 2(f) of the Clayton Act as amended by the Robinson-Patman Act. (Oct. 15, 1914, c. 323, section 2, 38 Stat. 730; June 19, 1936, c. 592, section 1, 49 Stat. 1526; 15 U. S. C., section 13).

Specifically, movant asks leave to present to this Court argument and authority in support of the following proposition as the correct rule on the questions presented by petitioner:

In order to establish a *prima facie* case that a person has knowingly induced or received a discrimination in price prohibited by section 2 of the Clayton Act as amended by the Robinson-Patman Act, it is not necessary to prove that the differentials in

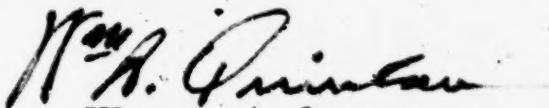
question made more, and that such person knew they made more, than due allowance for differences in the sellers' costs of manufacture, sale or delivery resulting from the differing methods or quantities in which the products were sold. Rather, it is sufficient to establish, as the Commission has done, that the purchaser knowingly induced or received price differentials which were discriminatory in that they represented prices known by such purchaser to be less than those charged for products of like grade and quality to other purchasers with which it was in competition. If the knowing inducement or receipt of such a discrimination in price is established, the burden is then upon the purchaser to show that the discrimination was permissible under one or more of the provisos in section 2 of the Act.

Movant is of the opinion that in addition to the statutory construction and legislative history of the Act in question, the principle upon which *Burnet v. Houston* (1931), 283 U. S. 223, was decided justifies the above statement of the law; and that the enforcement of the Act so construed is not impracticable or oppressive in the conduct of commercial transactions. The application of *Burnet v. Houston* was not briefed or argued by counsel for either petitioner or respondent in the court below; and respondent Commission did not, it is submitted, fully present argument that its construction of the Act does not lead to unjust and oppressive results, but rather does lead to the objective for which the Robinson-Patman Amendment to the Clayton Act was enacted.

CONCLUSION

Movant and its counsel have followed and participated in this case continuously since movant's intervention before the Federal Trade Commission in 1947. Movant believes and respectfully submits to this Honorable Court that by filing a brief amicus curiae it can contribute to a sound determination of the issue involved.

Respectfully submitted,



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November, 1952